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IN THE

Supreme Court of the United States

October Term, 1966
No. 256

DONALD C. GLOUNER, *et al.*,
Appellants,

vs.

SUPERIOR COURT OF THE COUNTY OF LOS ANGELES,
Appellee,

and

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Public Works,
Real Party in Adverse Interest.

MOTION TO DISMISS APPEAL AND BRIEF IN SUPPORT THEREOF.

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THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Public Works,

Real Party in Adverse Interest.

MOTION TO DISMISS APPEAL AND BRIEF IN SUPPORT THEREOF.

The People of the State of California, acting by and through the Department of Public Works, hereinafter called the "State," plaintiff and real party in adverse interest in the State court proceeding,[1] hereby move this

[1]Although appellants failed to include the State as appellee, it is the true answering party in this cause. The Orders for Possession were obtained upon application by the State and ran in favor of the State. In the Petition for Extraordinary Writ thereafter filed by appellants, the State was required under California procedure to be named and served as real party in interest and was entitled to and did serve and file points and authorities in opposition. Rule 56(a)(b) *California Rules of Court.* In Cali-

(This footnote is continued on the next page)

Honorable Court to dismiss the appeal herein. Pursuant to Rule 16(b) Revised Rules of the Supreme Court of the United States, the motion is made on the grounds that no substantial federal question is presented by appellants and that the Order of the District Court of Appeal for the State of California rests on an adequate non-federal basis.

Supplemental Statement of Proceedings Below.

The *ex parte* Orders for Possession herein were signed and filed on March 11, 1966. Said Orders provided that the State was authorized to take possession of the subject parcels of appellants' property on the dates set forth therein "or on the twenty-first day following the date of service of this order, whichever is later" [R. 25, 27].

Appellants were personally served with Summons and Complaint and the Orders for Possession on March 16, 1966, more than twenty days prior to the dates for possession set forth in said Orders [R. 32].

Prior to the effective date of the Orders for Possession and before moving to vacate said Orders, appellants appeared in the action by Answer [R. 28-29].

Appellants' motion to vacate was based solely on grounds of lack of jurisdiction and lack of due process [R. 30-31], and was denied by the Superior Court after briefing and argument by both sides [R. 44].

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fornia a petition that a Writ of Certiorari issue, such as appellants prayed for, *inter alia* [R. 56], is an additional method of reviewing the judicial act of a lower court. The lower court, as here the Superior Court of the County of Los Angeles, has no greater interest in the matter than when an appeal is taken from a judgment or order thereof. See *Matter of DeLucca*, 146 Cal. 110, 79 Pac. 853; *Lee v. Small Claims Court*, 34 Cal. App. 21, 92 P. 2d 937.

Section 1243.5 of the California Code of Civil Procedure Provides for Notice Before a Landowner Must Give Up Possession and Appellants Received Actual Notice by Personal Service and Had an Opportunity to Be Heard.

A reading of Section 1243.5 Code of Civil Procedure shows that it provides for obtaining possession before judgment in two phases. The first phase is *ex parte:* that is, the fixing and deposit of security and the entry of the Order for Possession by the Court. At this phase a landowner's rights are no more disturbed than the issuance of summons or filing of a *lis pendens* in an eminent domain proceeding. At this phase the condemnor has *prima facie* established its right to immediate possession and that it has deposited an amount reasonably adequate to secure payment of just compensation.

The second phase, as set forth in subdivision (c) and (d) of Section 1243.5 California Code of Civil Procedure, provides for both actual notice and an opportunity to be heard with respect to the security deposit. Thus, at least twenty days before an owner or occupant must vacate he receives, as did appellants herein, actual notice of the Order by personal service or notice by mail if he has previously appeared. Within said twenty days a landowner could move to protect his rights if the condemnor lacks authority to obtain immediate possession or if there is any defect or irregularity in obtaining the Order. At any time after the Order is made, the landowner may move to increase the security deposit.

The State submits that the foregoing satisfies the minimum standards of procedural due process enun-

ciated by this Honorable Court in *Mullane v. Central Hanover Trust,* 339 U.S. 306 at 314-315, as follows:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections (Citations omitted). But if with due regard for the particularities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied."

The cases cited by appellants on page 3 of their Jurisdictional Statement are not applicable to sustain jurisdiction herein. Said cases all involved the sufficiency of some form of substituted service resulting in a judgment or decree which operated to cut off a party's rights before he had actual notice of the pending suit.

Thus: *Griffin v. Griffin,* 327 U.S. 220 (validity of judgment and execution for accrued alimony under prior divorce decree: no actual notice to judgment debtor); *Mullane v. Central Hanover Trust,* 339 U.S. 306 (validity of decree settling accounts of a common trust fund: no actual notice to unknown, non-resident beneficiaries); *City of New York v. N.Y., New Haven and Hartford R.R. Co.,* 344 U.S. 293 (validity of order barring lien-claims in reorganization proceeding: no actual notice to known creditor); *Covey v. Town of Somers,* 351 U.S. 141 (validity of tax-lien foreclosure: actual notice received by mail but taxpayer an incompetent without guardian); *Walker v. Hutchinson City,* 352 U.S. 112 (validity of hearing to assess

compensation: no actual notice to known local resident); *Schroeder v. City of N.Y.*, 371 U.S. 208 (validity of service upon riparian landowners by newspaper publication and by posting notices on trees and poles along the river: no actual notice to landowner); *Wuchter v. Pizutti*, 276 U.S. 13 (validity of service of process on Secretary of State in personal injury action against non-resident motorist: no actual notice to defendant); *Armstrong v. Manzo*, 380 U.S. 545 (validity of adoption decree: no actual notice to natural father during adoption proceedings).

In the case at bar appellants received actual notice under subdivision (c) of the statute which requires personal service of the Orders for Possession at least twenty days before appellants had to relinquish possession. Unlike the situation in *Walker* and *Schroeder, supra,* no justiciable rights of appellants were foreclosed on making of the Orders *ex parte.*

The Procedure for Taking Possession Under Section 1243.5 California Code of Civil Procedure Is Less Summary Than the Federal Procedure for Taking Title (40 U.S.C. Sec. 258a), and the Latter Has Been Upheld Against Due Process Objections.

The "Declaration of Taking Act"—40 United States Code, Section 258a provides in substance that in a condemnation proceeding the United States may, at the time of filing its petition or anytime before judgment, file a Declaration of Taking of the subject property. Said declaration must contain certain prescribed statements and a description of the property. If at the time it is filed the Government deposits the estimated compensation with the court, title in fee simple absolute

will vest in the United States. At the same time, the right to immediately receive the estimated award vests in the landowner.

The "Declaration of Taking" or vesting of title does not depend on notice or service to the landowner; nevertheless, the procedure is not an unconstitutional deprivation of property, since it provides for payment of just compensation.

City of Oakland v. U.S., 124 F. 2d 959, 963;
Hessel v. A. Smith & Co., 15 Fed. Supp. 953, 957.

In a federal eminent domain action due process requires no more than that the owner be given an opportunity to be heard at some stage of the proceeding upon reasonable notice of the pending action.

No. Laramie Land Co. v. Hoffman, 268 U.S. 276;
Dohany v. Rogers, 281 U.S. 362, 369.

In other words, a taking of title or the right to possession in advance of notice or hearing thereon does not violate procedural due process if the owner's right to just compensation is secured and if he is given notice and an opportunity at some stage of the proceeding to present justiciable issues before he is finally divested of either title or possession.

Under California Decisional Law an Order for Possession Before Judgment Is Not Effective Until Served and Is Subject to Judicial Review of the Right to Take Possession.

The ruling of the California Superior Court denying appellants' motion to vacate the Orders for Possession also rests on an adequate non-federal basis: *i.e.,* that said Orders were conditional and did not affect appellants' right of continued occupancy until service thereof. The "effective date" of Orders for Possession obtained under Section 1243.5 Code of Civil Procedure has been decided in two California appellate decisions, *People v. Podrat,* 194 Cal. App. 2d 696, 15 Cal. Rptr. 343, and *People v. Salem Development Corp.,* 216 Cal. App. 2d 652, 31 Cal. Rptr. 193, which held that the Orders for Possession obtained *ex parte* were subject to the condition subsequent of service upon the landowner or occupants. Thus, the basic premise of appellants—that the Orders when made *ipso facto* divested appellants of possession—is at variance with California decisional law. The Orders when made gave the State the right to immediate possession, and when served required appellants to relinquish possession within the stated period. They did not operate to disturb appellants' rights until served.

Appellants' statement that "the taking of possession is not subject to appellate review" in California is incorrect (J.S. p. 11). If it appears that the public use of the property is not one for which immediate possession is authorized the Court, on motion, will annul

the order. *O. T. Johnson v. Superior Court,* 103 Cal. App. 2d 278, 229 P. 2d 849. If the condemnor is not entitled to immediate possession the order will be vacated, *Sierra Madre v. Superior Court,* 191 Cal. App. 2d 587, 12 Cal. Rptr. 836); or if the property is immune from condemnation the order will be annulled and further proceedings enjoined. *Eden Memorial Park v. Superior Court,* 189 Cal. App. 2d 421, 11 Cal. Rptr. 189.

After actual notice of the Orders appellants had an opportunity to be heard on the two matters to which they were entitled to a hearing: whether the State was entitled to immediate possession and whether the security deposited was adequate. Neither was raised by appellants in their motion to vacate the Orders. The other "facts," "equities" or "undue hardships" which appellants seek to raise are not within the scope of procedural due process. When the right of eminent domain is invoked, the plans of individual landowners must, within constitutional limitations, give way to those of the People. Furthermore, the problems of which appellants speak are moot since no contention was made below and none is asserted here, that the Orders were obtained in bad faith or that immediate possession worked a hardship on appellants.

The utter lack of merit of the instant appeal is an example of how State highway improvements could be needlessly delayed—at additional expense to the taxpayers and users thereof—if, in every case, a noticed

motion for possession were necessary. The burden on the courts as well as condemnors would be inestimable. Appellants' rights to notice and an opportunity to be heard are fully protected under both the statute and California decisional law and the State respectfully urges that this appeal be dismissed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1966
No. 756

DONALD C. GLOUNER, MURIEL J. GLOUNER, GARY D. GLOUNER, and PATRICIA ANN GLOUNER,

Appellants,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Appellee,

and

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Public Works,

Real Party in Adverse Interest.

BRIEF OPPOSING MOTION TO DISMISS.

Introduction.

The Real Party in Interest, hereafter called the State, bases its Motion to Dismiss on the grounds that no substantial federal question has been presented and that the decision below rests on adequate state grounds. As to the former, the lack of merit of the State's assertion is illustrated by the fact that the State has presented no argument as to the substantiality and importance of the question. In fact, as demonstrated *infra*, the question is of far-reaching importance and